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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GERALD J. McCANN, Defendant and Appellant.	B167088 (Los Angeles County Super. Ct. No. BA189658)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jacqueline A. Connor, Judge. Reversed.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Chung L. Mar, and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Gerald J. McCann, M.D., appeals from the judgment entered following his conviction, by court trial, for two counts of practicing medicine without a license (Bus. & Prof. Code, § 2053).[1] Sentenced to a five-year term of probation, he contends there was trial error.

The judgment is reversed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Proceedings*.

On November 23, 1999, defendant McCann, an orthopedic surgeon licensed by the Medical Board of California (hereafter, the Medical Board) was indicted on two felony counts of violating Business and Professions Code section 2053, for practicing medicine without a license. McCann was alleged to have violated section 2053 by performing two liposuction procedures "without being authorized to perform that act pursuant to a certificate obtained in accordance with Section 1248.1 of the Health and Safety Code."

McCann filed a demurrer to the indictment, arguing prosecution under section 2053 was precluded by the provisions set forth in Health and Safety Code sections 1248, et seq. On December 29, 1999, the trial court overruled the demurrer. On January 28, 2000, McCann filed a motion to set aside the indictment on the ground the grand jury did not have probable cause to indict. This motion, too, was denied. McCann then filed a second demurrer, which was construed as a motion for reconsideration and denied. On August 4, 2000, McCann filed a petition for writ of mandate or prohibition asking this court to order the trial court to sustain, without leave to amend, the second demurrer. We denied this petition on September 21, 2000.

On February 26, 2003, after a court trial, McCann was found guilty on two felony counts of violating section 2053. The trial court suspended imposition of sentence, put

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[1] All further statutory references are to the Business and Professions Code unless otherwise specified.

McCann on formal probation for five years, and ordered him to pay restitution to the two victims in the amount of approximately $1.1 million.

After filing a timely notice of appeal, McCann filed a petition for writ of coram vobis in this court on December 5, 2003. This writ petition pointed out section 2053 had been repealed effective January 1, 2003, almost two months before McCann was convicted. The writ petition alleged that after learning section 2053 had been repealed, McCann moved to dismiss the action and void the judgment, but the trial court ruled it no longer had jurisdiction because the notice of appeal had been filed. On February 19, 2004, this court denied McCann's coram vobis petition, saying the issues he raised would be more appropriately addressed in the appeal from his conviction.

2. *The trial*.

a. *Prosecution evidence.*

McCann is a licensed medical doctor. He was also the owner of Santa Fe Orthopedics, an outpatient medical clinic. At this clinic, on March 1 and April 1, 1997, McCann performed the two liposuction procedures which resulted in his criminal prosecution. On these dates, the clinic was not licensed for outpatient surgery under the Health and Safety Code. McCann was the only licensed medical person in attendance when he did these procedures. On these dates, McCann did not have malpractice insurance. He declared bankruptcy in December 2002.

Dr. Gary Bennett is a board certified anesthesiologist. He testified a doctor can act as his own anesthesiologist and monitor the patient too, although ideally, where the medication administered might interfere with a patient's life preserving reflexes, it is better to have another person do the monitoring. Heavy unconscious sedation puts a patient at risk of losing such life-preserving reflexes as maintenance of an open airway, spontaneous breathing, ability to cough, and proper functioning of the heart.

Bennett reviewed the medical records for the liposuction surgery McCann performed on Idalia Lopez on March 1, 1997. The drugs McCann gave Lopez sedated her so heavily her life preserving reflexes were put at risk. Lopez's vital signs were not adequately monitored; McCann should have had another person monitoring her while the

surgery was performed. Bennett reviewed the medical records for McCann's April 1, 1997, liposuction surgery on Yvonne Donnell-Behringer. She too had been sedated to the point where her life preserving reflexes were at risk. Her vital signs were not appropriately monitored, even though she presented special anesthesiological risk factors because she was morbidly obese, diabetic, and had recently been hospitalized for an asthma attack.

b. *Defense evidence.*

Jay Christensen, an expert in health care law, testified the California Medical Practices Act regulates people, not facilities. Only one license is issued to medical doctors, the physician's and surgeon's certificate, and no additional license is required before a medical doctor can administer anesthesia or perform surgery.

Christensen testified Health and Safety Code section 1248 et seq. "[p]rovides for the certification of out-patient settings where surgery is performed and where anesthesia is administered in doses that would potentially put patients at risk." He testified a licensed medical doctor "is obligated under the Medical Practices Act to practice only in facilities that have a properly established medical staff organization. [¶] So as part of that, the person would be obligated to make sure the facility was licensed . . . ." "Q. [By defense counsel]: If a person administers anesthesia at doses that may put the [patient's] life protective reflexes at risk in a facility not certified for such purposes, does that mean that the health care provider, in this case a licensed physician and surgeon, is practicing without a license? [¶] A. Absolutely not." "Q. Is there any circumstance under which you can contemplate based on your training and experience where a licensed physician and surgeon conducting a medical procedure in a facility, regardless of its regulatory status, would constitute the illegal practice of medicine? [¶] A. Not the unlicensed practice of medicine. There are many, many requirements on physicians. Such as that you can't have an ownership interest in a pharmacy, you can't share fees with people, there are many many. [¶] But the violation of those particular requirements and laws, they may be punishable as various things on their own. But they have never been understood in any context that I am familiar with to

add up to the conclusion that the physician is not licensed or certified under the Medical Practices Act."

Eric Stone is a supervisor with the Los Angeles County Department of Health Services, Health Facility Division. His official duties include the licensing and certification of health facilities. Stone agreed with Christensen's testimony that there is a distinction between medical doctor licensing and medical facility licensing. Stone testified he had incorrectly advised McCann's grand jury that Health and Safety Code section 1248 regulates medical doctors who perform general anesthesia. Stone's department regulates facilities, not medical doctors; doctors are regulated by the Medical Board.

c. *Trial court's findings*.

The trial court concluded McCann had violated section 2053: "[T]here was the unlawful practice of medicine. Conditions and circumstances did create a risk that meets the requisite level of danger of great bodily harm. The court finds this practice of medicine, the procedures of liposuction, was done without certification required under [Health and Safety Code section] 1248.1. [¶] [A]lthough there is some dispute as to the level of anesthesia used, the court is convinced . . . [the patients'] life protecting reflexes were at risk of loss. [¶] . . . [¶] To the extent . . . there is any issue with the Medical Board, as to whether or not the intent of the Medical Board is to keep that facilities versus practices separation in your argument, does have some merit. [*Sic.*] I think that's for the Medical Board to intervene."

CONTENTION

McCann's conduct did not constitute the unlicensed practice of medicine.

DISCUSSION

1. *McCann's conduct did not violate section 2053.*

McCann contends his convictions must be reversed because section 2053 did not apply to his conduct. He argues that as a properly licensed medical doctor he may have violated Health and Safety Code section 1248 et seq., for performing surgery in an unaccredited outpatient setting, but that as a matter of law he could not possibly have

violated section 2053. We agree with this analysis and will reverse McCann's conviction.[2]

At the time McCann performed the liposuction procedures, section 2053 applied to any person practicing medicine "without having at the time of so doing a valid, unrevoked or unsuspended certificate as provided in this chapter, *or* without being authorized to perform such act pursuant to a certificate obtained in accordance with some other provision of law." (Italics added.) The Attorney General concedes the first prong of section 2053, encompassed by the language "without having at the time of so doing a valid, unrevoked or unsuspended certificate as provided in this chapter," did not apply to McCann because he had a valid physician's and surgeon's certificate when he did the liposuctions.[3]

2. *Attorney General's arguments faulty and without support.*

The Attorney General contends, that McCann was properly prosecuted "under the second prong of section 2053, namely, that the surgery was performed 'without [appellant] being authorized to perform that act pursuant to a certificate obtained in accordance with some other provision of law.' Sante Fe Orthopedics was not licensed for outpatient surgery pursuant to Health and Safety Code section 1248.1, et seq., and appellant was the sole owner of it.[4] Even though appellant possessed a Physicians and

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[2] Given this result, we need not reach McCann's claims of grand jury error and improper conviction under a repealed criminal statute.

[3] At the time he treated the patients at issue here, McCann held a valid physician's and surgeon's certificate issued pursuant to section 2050, which provides: "The Division of Licensing shall issue one form of certificate to all physicians and surgeons licensed by the board which shall be designated as a 'physician's and surgeon's certificate.' " Section 2051 provides: "The physician's and surgeon's certificate authorizes the holder to use drugs or devices in or upon human beings and to sever or penetrate the tissues of human beings and to use any and all other methods in the treatment of diseases, injuries, deformities, and other physical and mental conditions."

[4] Despite this reference to the fact McCann not only practiced medicine at the clinic, but owned it as well, the Attorney General does not really pursue any theory based on McCann's role as the owner, as opposed to his role as a practicing medical doctor.

Surgeons License, he was expressly not authorized by the license to perform the charged acts. (§ 2216.) A necessary certificate had not been obtained, and the 'other provision of law' prong of section 2053 supported appellant's conviction."

Business and Professions Code section 2216,[5] provides, in pertinent part, that "no physician and surgeon shall perform procedures in an outpatient setting using anesthesia, . . . in doses that, when administered, have the probability of placing a patient at risk for loss of the patient's life-preserving protective reflexes, unless the setting is specified in Section 1248.1." Health and Safety Code section 1248.1 provides, in pertinent part, that "No association, corporation, firm, partnership, or person shall operate, manage, conduct, or maintain an outpatient setting in this state, unless the setting is one of the following: [¶] . . . [¶] (g) An outpatient setting accredited by an accreditation agency approved by the division pursuant to this chapter." The Attorney General argues McCann is liable under section 2053 *because "a necessary certificate had not been obtained*, as it should have been, pursuant to [Health and Safety Code] section 1248.1. The 'other provisions of law' prong of section 2053 implicates section 2216." (Italics added.)

a. *Defense expert Christensen's testimony.*

We are not persuaded by the Attorney General's argument. It was contradicted by defense expert Christensen, who testified a licensed doctor performing surgery in an uncertified setting would not be practicing medicine without a license. He explained the

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5 Business and Professions Code section 2216 provides: "On or after July 1, 1996, no physician and surgeon shall perform procedures in an outpatient setting using anesthesia, except local anesthesia or peripheral nerve blocks, or both, complying with the community standard of practice, in doses that, when administered, have the probability of placing a patient at risk for loss of the patient's life-preserving protective reflexes, unless the setting is specified in Section 1248.1. Outpatient settings where anxiolytics and analgesics are administered are excluded when administered, in compliance with the community standard of practice, in doses that do not have the probability of placing the patient at risk for loss of the patient's life-preserving protective reflexes. [¶] The definition of 'outpatient settings' contained in subdivision (c) of Section 1248 shall apply to this section."

difference between regulating health care practitioners and regulating medical settings: "[Section] 2053 refers to a person having a certificate. One that's granted to an individual. [¶] . . . [W]hereas the language in [Health and Safety Code section] 1248.8 refers to the certification of . . . a setting. One is for a person and the other is for a setting. [¶] Not only that, but the language in 2053 has been on the books for decades. It was on the books and . . . well understood long before 1248 et seq. were enacted." Christensen also explained there were two groups of health care practitioners corresponding to the two prongs of section 2053: on one hand there were medical doctors and, on the other hand, there were such licensed healthcare providers as "podiatrists or dentists or psychologists or nurse practitioners."

We conclude Christensen's testimony was in accord with a plain reading of section 2053, with the applicable legislative history, and with a long line of judicial and Attorney General opinions construing the unlicensed practice of medicine statutes.

b. *Certificates already obtained.*

The second prong language, on which the Attorney General stakes his case, refers to practicing medicine "without being authorized to perform such act pursuant to a certificate *obtained* in accordance with some other provision of law." (Italics added.) On its face, this language apparently refers to *a certificate already obtained*, rather than a certificate that should have been obtained but wasn't. This reading leads to the reasonable, common sense interpretation that the second prong language is only aimed at unauthorized medical practice on the part of licensed health practitioners, *other than medical doctors*, who have acted beyond the limits of licenses they already hold.

This reading of section 2053 is confirmed by the legislative history of Senate Bill No. 225 (Stats. 1967, ch. 1103, p. 2741), which added the second prong language to section 2141,[6] the predecessor statute of section 2052. The legislation's author, State

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[6] Before it was amended in 1967, section 2141 provided: "Any person, who practices or attempts to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this State, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement,

Senator Tom Carrell, wrote to Governor Reagan that the bill "adds a felony provision [section 2141.5] to the existing law relative to the practice of medicine [section 2141], and is aimed to control those who attempt to practice any system of treating the sick who are not authorized to do so . . . ." [Letter dated August 4, 1967] A memorandum from the California Department of Professional and Vocational Standards to Governor Reagan, recommending that he sign the bill, stated: "*Apparent effect of [the amendment to section 2141] is to recognize that persons licensed under laws other than Medical Practice Act, e.g., chiropractors, physical therapists, and osteopathic drugless practitioners, are authorized to engage in limited performance of the acts proscribed by . . . [§] 2141*." (Memorandum dated August 1 [?], 1967.) (Italics added.)

3. *This court's analysis supported by judicial and Attorney General opinions.*

Our reading of section 2053 is further corroborated by a long line of judicial and Attorney General opinions construing sections 2052 and 2053, and their predecessor statutes sections 2141 and 2141.5.[7] Both before and after the 1967 legislation creating

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disorder, injury, or other mental or physical condition of any person, *without having at the time of so doing a valid, unrevoked certificate as provided in this chapter*, is guilty of a misdemeanor." (Italics added.) The passage of Senate Bill No. 225 in 1967 amended section 2141 to read: "Any person, who practices or attempts to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other mental or physical condition of any person, *without having at the time of so doing a valid, unrevoked certificate as provided in this chapter, or without being authorized to perform such act pursuant to a certificate obtained in accordance with some other provision of law*, is guilty of a misdemeanor." (Italics added.)

[7] The passage of Senate Bill No. 225 in 1967 enacted section 2141.5, which provided: "Any person who willfully, under circumstances or conditions which cause or create risk of great bodily harm, serious mental or physical illness, or death, practices or attempts to practice, or advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other mental or physical condition of any person, without having at the time of so doing a valid, unrevoked certificate as provided in this chapter, or without being authorized to perform such act pursuant to a certificate obtained in accordance with some other

the second prong language in sections 2141 and 2141.5, these opinions uniformly reasoned that the unlicensed practice of medicine did not include *either* healing acts performed by licensed medical doctors *or* healing acts performed by non-doctor health care practitioners that were within the scope and limits of their licenses. (See *Cooper v. State Bd. of Medical Examiners* (1950) 35 Cal.2d 242, 250 [blood transfusion performed by defendant licensed as both clinical lab technologist and drugless practitioner violated section 2141 because unauthorized by either license]; *Crees v. California State Board of Medical Examiners* (1963) 213 Cal.App.2d 195, 209 ["The only effect of the enactment of the Chiropractic Act on the Medical Practice Act was to create a limited exception to the prohibition against practicing a healing art without a license from the Board of Medical Examiners; that a holder of a license to practice chiropractic may practice chiropractic (not medicine or surgery); and that is the limit of the exception."]; *Millsap v. Alderson* (1923) 63 Cal.App. 518, 527 [holder of naturopath license has limited authority because, "while the physician and surgeon is authorized to treat the sick and afflicted by any and all methods and means, the naturopath is limited in his treatment to his particular system"]; 58 Ops.Cal.Atty.Gen. 558, 562 (1975) [colonic irrigation performed by licensed chiropractor would violate section 2141 because "[s]uch treatment does not fall within the scope of the definition of the practice of chiropractic"]; 21 Ops.Cal.Atty.Gen. 230 (1953) [clinical lab technician licensed by State Board of Health may do venipuncture to draw blood for testing purposes, but performing spinal puncture would violate section 2141]; 7 Ops.Cal.Atty.Gen. 139 (1946) [licensed chiropodist who assisted doctor in amputation surgery would violate section 2141 because such treatment is outside scope and practice of chiropody].)

In the face of all this support for the defense expert's testimony, the Attorney General does not cite a single contradictory case or other relevant authority. The Attorney General merely argues McCann violated section 2053 because "a necessary certificate *had not been obtained*, as it should have been, pursuant to section 1248.1."

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provision of law, is punishable by imprisonment in the county jail for not exceeding 1 year or in the state prison for not less than 1 year nor more than 10 years."

(Italics added.) Thus, the Attorney General insists, based only on the wording of the statute, that the second prong language should be read to mean "without being authorized to perform such act pursuant to a certificate *that should have been obtained* in accordance with some other provision of law *but wasn't*." However, this interpretation seems to entail the absurd result that the unlicensed practice of medicine statute would no longer apply to non-doctor health care practitioners who acted beyond the scope of their *already-obtained* licenses. Surely that was not the legislative intention here.

Moreover, the Attorney General's interpretation relies on section 2216 to provide a crucial nexus between section 2053 and the provisions of Health and Safety Code section 1248 et seq. The Attorney General argues a licensed medical doctor "has no license or authority to perform medical procedures in an 'outpatient setting' that has not been accredited pursuant to Health and Safety Code section 1248.1," and therefore "*a licensed physician is subject to a prosecution under section 2053 if section 2216 applies*." (Italics added.)

But section 2216 does not contain *any* criminal penalty,[8] and under Health and Safety Code section 1248.8[9], the punishment for violating a clinic accreditation

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8 Business and Professions Code section 2216 provides: "On or after July 1, 1996, no physician and surgeon shall perform procedures in an outpatient setting using anesthesia, except local anesthesia or peripheral nerve blocks, or both, complying with the community standard of practice, in doses that, when administered, have the probability of placing a patient at risk for loss of the patient's life-preserving protective reflexes, unless the setting is specified in Section 1248.1. Outpatient settings where anxiolytics and analgesics are administered are excluded when administered, in compliance with the community standard of practice, in doses that do not have the probability of placing the patient at risk for loss of the patient's life-preserving protective reflexes. [¶] The definition of 'outpatient settings' contained in subdivision (c) of Section 1248 shall apply to this section."

9 Health and Safety Code section 1248.8 provides: "(a) Any person or entity that willfully violates this chapter or any rule or regulation adopted under this chapter shall be guilty of a misdemeanor and subject to a fine not to exceed one thousand dollars ($1,000) per day of violation. [¶] (b) In determining the punishment to be imposed under this section, the court shall consider all relevant facts, including, but not limited to, the following: [¶] (1) Whether the violation exposed a patient or other individual to the risk

requirement is only a misdemeanor. Furthermore, because McCann was not convicted until after the July 2000 enactment of section 2216.1, the mitigation of punishment rule discussed in *People v. Rossi* (1976) 18 Cal.3d 295, 299 (noting "the well-established common law rule which, in the absence of clear legislative intent to the contrary, accorded a criminal defendant the benefit of a mitigation of punishment adopted before his criminal conviction became final"), would presumably apply. Section 2216.1[10] expressly provides that a medical doctor who "perform[s] procedures in any outpatient setting except in compliance with Section 2216" is guilty of unprofessional conduct. So even if the People could use section 2216 to make a Health and Safety Code violation, the predicate for a prosecution under section 2053, McCann still could not have been prosecuted for a felony.

The Attorney General's theory lacks any apparent support from legal authority, practical usage, or the literal wording of the statute. We agree with McCann's contention that, regardless of what other laws or regulations he may have broken, his alleged conduct could not have violated Business and Professions Code section 2053.

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of death or serious physical harm. [¶] (2) Whether the violation had a direct or immediate relationship to health, safety, or security of a patient or other individual. [¶] (3) Evidence, if any, of willfulness in the violation. [¶] (4) The presence or absence of good faith efforts by the outpatient setting to prevent the violation. [¶] (c) For purposes of this section, 'willfully' or 'willful' means that the person doing an act or omitting to do an act intends the act or omission, and knows the relevant circumstances connected with the act or omission. [¶] (d) The district attorney of every county shall, upon application by the Division of Medical Quality or its authorized representative, institute and conduct the prosecution of any action or violation within the county of any provisions of this chapter."

10 Business and Professions Code section 2216.1 provides: "On and after July 1, 2000, it is unprofessional conduct for a physician and surgeon to perform procedures in any outpatient setting except in compliance with Section 2216, unless the setting has a minimum of two staff persons on the premises, one of whom shall either be a licensed physician and surgeon or a licensed health care professional with current certification in advanced cardiac life support (ACLS), as long as a patient is present who has not been discharged from supervised care."

DISPOSITION

The judgment is reversed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.